Petition

81-1620

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NORMAN VINEBERG and
DOUGLAS TODD PARKER,

Petitioners/Defendants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent/Plaintiff.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Were petitioners denied their right to a jury trial guaranteed by the Sixth and Fourteenth Amendments by virtue of the trial court's instruction that the jurors need not agree on the form of theft committed by petitioners when the acts supporting the different prosecution theories took place at different times?
2. Were petitioners denied due process of law guaranteed by the Fifth and Fourteenth Amendments by the trial court's refusal to instruct the jury that an honest but unreasonable mistake of fact was a defense to a charge of theft?

PARTIES TO THE PROCEEDINGS

The parties named in the caption are the only parties to the proceedings below.

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OPINIONS BELOW

Petitioners' grand theft convictions were affirmed by the California Court of Appeal for the Second Appellate District on October 30, 1981. The Court of Appeal's modified opinion was entered on November 13, 1981. The Court of Appeal's opinion appears in the California Official Reports at 125 Cal.App.3d 127. It does not yet appear in the unofficial reports. A copy of that opinion is attached to this petition as Appendix "A."

Attached as Appendix "B" and "C," respectively, are the postcard denials by the Court of Appeal of petitioners' petition for rehearing and by the Supreme Court of petitioners' petition for hearing.

JURISDICTION

The modified opinion of the California Court of Appeal affirming petitioners' convictions was entered on November 13, 1981. That court denied a timely petition for rehearing on November 25, 1981.

A timely petition for hearing to the California Supreme Court was denied on January 20, 1982.

Jurisdiction is conferred on this Court by 28 USC §1257(3).

APPLICABLE CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . . ."

United States Constitution, Article XIV

> "No State shall . . . deprive any person of life, liberty, or property, without the process of law. . . ."

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NORMAN VINEBERG and DOUGLAS TODD PARKER,	)
Petitioners/Defendants,	)
vs.	)
PEOPLE OF THE STATE OF CALIFORNIA,	)
Respondent/Plaintiff.	)

PETITION FOR WRIT OF CERTIORARI

This is a petition for writ of certiorari by Norman Vineberg and Douglas Todd Parker to review the order of the California Court of Appeal affirming their convictions for grand theft. As will be shown below, those convictions involve federal constitutional infirmities and should thus be set aside.

STATEMENT OF THE CASE

The petitioners' convictions were based upon their involvement with United States Silver Corporation in 1974, 1975, and 1976. During that period, the seven persons whose losses form the basis for the seven charges here delivered gold or silver to U.S. Silver and suffered losses. [1] During the three years in question, the defendants owned and were ultimately responsible for the management of U.S. Silver.

U.S. Silver bought, sold and stored gold and silver coins and bullion. The business employed and relied upon a battery of CPA's and attorneys to direct the course of its affairs, paying several hundred thousand dollars for these professional services. Sales were both outright and on margin, and

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[1] It is not clear when those losses occurred.

storage included gold and silver purchased on margin, as well as that wholly owned by customers.

The seven counts with which this petition is concerned involved the storage by U.S. Silver of gold and silver belonging to seven customers. Each customer testified that he or she owned gold or silver stored by U.S. Silver between 1974 and 1976, and -- with the exception of one, Raymond Foster -- each testified that his or her gold or silver had not been returned by U.S. Silver. Months, and often years, elapsed between the time the goods were delivered and their failure to be returned.

John Cass stored silver with U.S. Silver in 1974. (64) [2/] At the time of trial several years later, Cass had not received his silver back. (71)

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[2] All page references are to the Reporter's Transcript on Appeal.

Henry Boetticher purchased 25 Austrian gold coins from U.S. Silver in April 1974. (111) Rather than taking delivery of his coins, Boetticher stored them with U.S. Silver. (111-112) In June 1976, Boetticher was informed that U.S. Silver was in the hands of a receiver and that "we could not either sell or pick up coins." (113)

Donna Scott purchased silver from U.S. Silver in early 1974, storing all of it with the firm. (154,157-158) In November, 1974, she exchanged her silver for 100 Austrian gold coins. (162) Scott never saw her gold or silver investment (163), and, at the time of trial, hadn't received any part of her investment back. (165)

Earl Hellmars delivered silver to U.S. Silver for storage on July 30, 1975. (133) On September 25, 1975, Hellmars purchased 20 gold medallions which he was told would

be ready in a few days. (139,143) He never made any attempt to pick up the medallions or his stored silver. (143)

Doreen Hehn purchased 6 bags of silver coins from U.S. Silver in September 1975. She left the coins with U.S. Silver for storage, having been informed that she would be able to obtain them on two-days' notice. (97-98) Hehn never requested delivery of her silver and had not received any part of it back at the time of trial. (99)

Frances O'Hern delivered silver to U.S. Silver for storage. (33) At the time of trial, he had not received his silver back. (40) Raymond Foster, like O'Hern, transferred silver to U.S. Silver for storage. (217) Foster made no attempt to obtain his silver from the firm. (239)

During 1974, two complete audits of U.S. Silver were conducted by the California

Department of Corporations and showed no financial irregularities. (1306) At the time of those audits, and as early as April 1974, the Department was aware of the fact that U.S. Silver did not segregate company-owned bullion from customer-owned bullion. All bullion inventory was kept in the company's vault without regard to its ownership. (1306)

During this period, policy-making decisions at U.S. Silver were made by petitioners Parker and Vineberg, in conjunction with their accountants and attorneys. (1414) In October 1974, U.S. Silver hired the CPA firm of Freedman, Morris, Horowitz and Good as their accountants because the company had had accounting problems in the past which it wanted corrected. (1051-1052) The accountant's first audit was for the year ending October 31, 1974. It disclosed many

bookkeeping errors and resulted in the institution of major changes in U.S. Silver's accounting system. (1053)

Until April 1975, U.S. Silver maintained sufficient physical inventory to cover the storage liability to its customers. Because defendants Parker and Vineberg, as well as Rubin, their attorney, felt that there was considerable question as to whether actual, physical inventory needed to be maintained to cover storage liability, Rubin decided to determine from the Department of Corporations if the storage liability could be "covered" by the purchase of futures contracts so that the physical inventory could be "arbitraged" [3/]

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[3] "Arbitrage" is the instantaneous buying and selling of a given commodity to capitalize on a price differential. Arbitrage transactions may result from price differences between markets, between different sized bars, or between coins and

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to increase U.S. Silver's profits. (1897) Rubin wrote a letter to the Department seeking permission to "cover" storage liability by the purchase of futures contracts. (1904) In April 1975, Rubin informed Parker that he had received permission to sell the storage inventory and cover storage liability with futures contracts and working capital. (1906-1907) Rubin confirmed that he had a letter from the Department allowing the coverage of storage liabilities with price-related commodities, such as bullion coins. (1919-1920)

Based upon Rubin's advice, the defendants began to arbitrage and "cover" their storage accounts. The physical silver inventory sold was "covered" by the purchase

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3 Cont'd
bullion, or between different months in the futures market. (1867,1873-76)

of futures contracts for the same quantity of silver. Thus, the company remained "flat" and there was no market risk incurred by storage customers. (1754)

After receipt of the letter from the Department of Corporations, Parker and Vineberg believed storage to be nothing more than a liability to deliver silver or gold to storage customers on demand. (1952) Relying on Rubin's advice, Parker and Vineberg began to use stored silver to obtain arbitrage profits. They did not, however, intend to put storage accounts at risk in their business nor to expose storage customers to market risk. 4/

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4 Evidence that the defendants' course of conduct was based upon the advice of their attorney and the authorization of the Department of Corporations is set forth in the Court of Appeals opinion at 125 Cal.App.2d at 133. A letter from the Department of Corporations, referring to

Cont'd

In January 1976, the accountant's year-end audit for the year ending October 31, 1975, disclosed errors in record keeping which caused an understatement of U.S. Silver's income. The errors were of such a magnitude that the defendants decided to immediately inform the Department of Corporations. (1232)

STAGE IN PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED

The first issue presented by this petition was raised by objection of trial counsel to the jury instruction ultimately given by the trial court. That objection was overruled. It appears at Reporter's Transcript 2559-60. The issue was raised on appeal in the California Court of Appeal, and by petition for hearing in the California Supreme Court.

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4 Cont'd
communications from defendants' attorney concerning the use of price-related commodities as cover, is attached to the Court's opinion as an exhibit.

The second issue presented was raised in the trial court by counsel's request for a jury instruction setting forth petitioners' theory with regard to the issue. The requested instruction was refused. It, too, was raised on appeal in the California Court of Appeals and on petition for hearing in the California Supreme Court.

Both issues were considered by the Court of Appeal and are discussed in its opinion. Both were rejected by the Court as grounds for reversal.

ARGUMENT

I

THE TRIAL COURT'S INSTRUCTION DENIED PETITIONERS THEIR RIGHT TO A JURY TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS IN THAT THEY EXPRESSLY PERMITTED A VERDICT BASED UPON INCONSISTENT FINDINGS BY INDIVIDUAL JURORS.

Over defense counsel's objection (2559-60), the trial court instructed the jury that:

> "If you agree unanimously that defendant committed the crime of theft, you should find the defendant guilty, and you are not required to agree as to which particular form of theft the defendant committed." (CT 121)

Under the circumstances of this case, where more than one act committed by petitioners could support a given count of the indictment, the use of that instruction was error, for it presents the "danger of the defendant being convicted of an offense where part of the jury might think one offense and part might think another offense proved." People v. Creighton, 47 Cal.App.3d 314, 320, 129 Cal.Rptr. 249 (1976).

In the proceedings below, the District Attorney contended that the defendants committed the crimes of grand theft as charged in the indictment either by committing larceny by trick at the time that gold or silver was entrusted to their care, or by

embezzling gold or silver after it had been entrusted to their care. Thus, the prosecution urged not only that two different theories could support the grand theft charges, but that those theories were based on different acts. It was never contended -- nor could it have been -- that the larceny by trick and embezzlement with regard to a given count resulted from the same act committed by petitioners. Rather, the two theories as to each count were based on two separate acts: the delivery of gold or silver to petitioners' care and their acceptance of it with the intent to convert it was allegedly larceny by trick and the later conversion of gold or silver already in their care was embezzlement. Because each of the counts could be based on either of the two acts, the instruction was improper.

It has long been the law in the California courts that, when a defendant is prosecuted for a violation of a statute and the proof shows several acts sufficient to constitute the offense, the jury must be instructed that in order to return a guilty verdict they must all agree on at least one of the unlawful acts shown by the evidence. People v. Scofield, 203 Cal. 703, 709-11, 265 P. 914 (1928); People v. McMillan, 45 Cal.App.2d Supp. 821, 829-30, 114 P.2d 440 (1941). Thus, while the objected-to instuction may be appropriate where one act is alleged but two alternate theories are relied upon, People v. Failla, 64 Cal.2d 560, 568, 51 Cal.Rptr. 103 (1966), it may not be given where more than one act sufficient to constitute the charged offense has been shown:

> "Where, as in this case, the proof of either of two facts constitutes

> "the offense charged, the jury should be instructed that all twelve must agree that one fact or the other is established; it will not do for part of them to agree on the existence of one fact, the rest of them concluding that the other fact was established."
> People v. Anderson, 199 Cal.App. 2d 510, 521, 18 Cal.Rptr. 793 (1962)

The Scofield case was followed by the California Court of Appeal in People v. McNeill, 112 Cal.App.3d 330, __ Cal.Rptr. __ (1980). There, a defendant was charged with assault with a deadly weapon, the information alleging more than one victim in one count. The trial court instructed the jury that it need not find that the defendant had assaulted all of the victims named in the assault count; that

> "It is sufficient if you find that defendant committed these acts on only one of the named individuals."
> 112 Cal.App.3d at 335.

According to the Court of Appeals, the instruction did not go far enough, for it did not require the jurors to agree unanimously on the identity of the victim of the assault. It is fundamental, said the court, that a defendant is entitled to the unanimous verdict of the jury.

> "Where [a] defendant is charged in a single count with several offenses and the evidence tends to show that he committed more than one such offense, the jury must agree on the particular act committed in order to convict. (See, People v. Scofield, (1928) 203 Cal. 703, 710.) The possibility that the jurors may have come to different conclusions as to the identity of the assault victim vitiates the constitutionally required assurance of juror unanimity as to the assault conviction." People v. McNeill, supra, 122 Cal. App.3d at 335-36.

The instruction here expressly permitted a verdict based on inconsistent findings by individual jurors. United States v. Pavloski, 574 F.2d 933, 936 (7th Cir. 1978). And,

while a unanimous jury verdict is not required by the Sixth and Fourteenth Amendments in state court criminal trials, Johnson v. Louisiana, 406 U.S. 356 (1972), requires reversal for it cannot be said that even a majority of the jurors below agreed on the same theory of culpability. See, Johnson v. Louisiana, supra, 406 U.S. at 365, 366.(Blackmun, J., concurring) (7-5 standard would "afford me great difficulty".)

According to the Fifth Circuit, the problem presented here is best illustrated by example:

> "A single criminal code section might prohibit a number of distant acts; for example, a traffic control statute might prohibit (a) speeding, (b) driving without lights at night, (c) making a turn from the wrong lane, and (d) failing to use turn signals. At a trial for violating the statute, the prosecution might present some evidence that

> "each of the prohibited acts was performed by the defendant, and the judge might charge the jury that the defendant would be guilty of violating the statute if the jury found he had done any one of the prohibited acts. If three members of the jury found that the defendant was guilty of speeding but had not committed any of the other prohibited acts, and three other jurors found that the only illegal act the defendant committed was driving without lights at night, and three other jury members found that the only prohibited act the defendant performed was making a turn from the wrong lane, and the final three jurors found that the only wrong the defendant committed was failing to use his turn signals, the defendant's right to a unanimous verdict would be violated if the jury found him guilty of violating the code section. The prosecution would not have convinced all of the jurors that the defendant committed one or more of the unlawful acts. Indeed, nine of the jurors would have found that the defendant did not perform each of the prohibited acts." United States v. Gipson, 553 F.2d 453, 458, n.8 (5th Cir. 1977).

Here, as in Gipson, the trial court instructed the jury that satisfaction "beyond any reasonable doubt that [the defendant] did

"any one of [the] acts charged" would support a conviction. Here, as in Gipson, evidence was presented as to more than one act, each sufficient to support a conviction. It cannot be said that more than six jurors here agreed on either of the acts which might have supported the guilty verdicts. Thus, petitioners' right to a jury trial was infringed upon and their convictions should be set aside. [5/]

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[5] The objection presented here cannot be answered by stating that Johnson v. Louisiana does not require unanimity of state court juries, for this case, unlike Johnson and Apadaca v. Oregon, 406 U.S. 404 (1972), it cannot be determined from the record here that a majority of jurors sufficient to satisfy the Sixth and Fourteenth Amendments agreed on the act committed by petitioners which resulted in their conviction.

II

THE TRIAL COURT'S INSTRUCTION DENIED PETITIONERS DUE PROCESS OF LAW IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS IN THAT THEY ALLOWED A CONVICTION WITHOUT PROOF BEYOND A REASONABLE DOUBT OF FELONIOUS INTENT.

It is hornbook law that an honest mistake of fact is a defense to a charged specific intent crime:

> "If no specific intent or other special mental element is required for guilt of the offense charged, a mistake of fact will not be recognized as an excuse unless it was based upon reasonable grounds. [However, where] a specific intent or other special mental element is required for guilt of the offense charged, the possibility of excuse due to a mistake of fact not based on reasonable grounds is obvious. The ultimate question in any prosecution is whether or not all the essential elements of guilt are established. If any such element is found to be wanting, guilt has not been substantiated; and hence if proof of a mistake of fact, even without the support of reasonable grounds, "negates the existence of such an element, it also disproves the charge itself." PERKINS, CRIMINAL LAW, 940-41 (2d Ed. 1969).

Larceny is the prime example of a crime in which an unreasonable mistake of fact which negates a defendant's specific intent is a defense.

Because theft offenses require a specific intent to steal, a defendant acting in the honest but unreasonable belief that he has the right to the use of the property in question cannot be convicted. Thus, "a conversion of property entrusted is not embezzlement if it was due to a mistake giving rise to a bona-fide belief of authority to appropriate, whether the 'belief was well-founded or not.'" PERKINS, supra, at 941. Since the specific intent to steal or convert the property of another is an element of theft offenses, jurors must be instructed that, in order to convict, they must find that there is evidence beyond a reasonable doubt of the intent to steal.

As Professor Fletcher explains:

> "Larceny. . . is subject to prosecution only for intentional commission. Thus if a mistake bears on the intent required for larceny, it categorically prevents conviction regardless of whether the mistake is reasonable or unreasonable." FLETCHER, RETHINKING CRIMINAL LAW, §9.1.2 at 687 (1978).

Here, in spite of evidence elicited on cross-examination of prosecution witnesses and on direct examination of the defendants tending to show that the defendants used the bullion entrusted to them by customers in the mistaken belief that such use was lawful, the trial court refused to instruct the jury that an honest but reasonable mistake of fact was a defense to the charges. Rather, the Court instructed the jury that a mistake of fact had to be both honest and reasonable in order to constitute a defense.

In 1979, the Appellate Department of the Superior Court for the County of Los

Angeles reversed a theft conviction because of a trial court's refusal to instruct a jury that an honest but unreasonable mistake of fact was a defense in a theft case. People v. Navarro, 99 Cal.App.3d Supp. 1, 160 Cal.Rptr. 692 (1979). According to the Appellate Department,

> "The question for determination on appeal is whether the defendant should be acquitted if there is a reasonable doubt that he had a good faith belief . . . that he had the permission of the owner to take the property or whether that belief must be a reasonable one as well as being held in good faith." People v. Navarro, supra, 99 Cal.App. 3d Supp. at 4.

Holding that a defendant is entitled to an instruction that an honest but unreasonable mistake is a defense, the Court reversed Navarro's conviction. See also, People v. Flannel, 25 Cal.3d 668, 682, 160 Cal.Rptr. 84 (1980) ("a genuine but unreasonablly held belief" may negate the mental state required

for conviction of an offense); People v. Wetmore, 22 Cal.3d 318, 327, 149 Cal.Rptr. 265 (1978) (an honest but unreasonable belief in the lawfulness of a defendant's conduct negates the specific intent required for a burglary conviction).

Evidence at petitioners' trial showed they were advised, and believed, they could lawfully convert commodities stored by customers. It was for a jury -- a properly instructed jury -- to determine whether that evidence was sufficient to negate the mens rea required for a theft conviction. Absent proper instruction, because there is no way to "gauge the precise effect" of the trial court's refusal to give the requested instruction, People v. Gainer, 19 Cal.3d 835, 854, 139 Cal.Rptr. 861 (1977), petitioners convictions should be reversed.

Trial court's instructions thus deprived

petitioners of their right, guaranteed by the due process clause, to be convicted only upon proof beyond a reasonable doubt of the elements of their alleged offenses. In re Winship, 397 U.S. 358 (1970).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal for the Second Appellate District.

Respectfully submitted,

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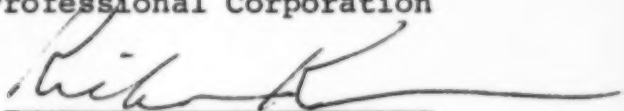
A Professional Corporation

By 
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Appendix

CERTIFIED FOR PUBLICATION

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, vs. NORMAN VINEBERG and DOUGLAS TODD PARKER, Defendants and Appellants.	2d Crim.No. 36674 LASC No. A-340755 Court of Appeal-Second Dist. FILED Oct. 30, 1981 Clay Robbins, Jr., Clerk

The defendants were convicted of seven counts of grand theft arising from the sale by them of gold and silver which was stored with their company, United States Silver Corporation (hereinafter referred to as U.S. Silver).

THE FACTS

Defendants Vineberg and Parker were at all times relevant to these proceedings, the owners, operators, and persons in control of U.S. Silver, U.S. Silver was in the business of buying, selling and storing gold and silver coins and bullion. As respects its storage operation, U.S. Silver maintained a vault on its premises and advertised for storage customers, stressing the safety of placing the precious metals in its vault for safekeeping.

In addition to storing its own gold and silver in its vault, U.S. Silver stored gold and silver purchased by its customers on margin and gold and silver which was wholly owned by the storage customers. U.S. Silver did not segregate company-owned bullion from customer-owned bullion, nor was the property of one storage customer segregated from the

property of the others.

During the years of 1974 and 1975, each of the seven persons who are named as victims in the seven counts with which this appeal is concerned, along with many others, stored silver bullion in the form of bars and gold coins and medallions with U.S. Silver. The storage agreement did not authorize defendants to use the stored property in their personal business, nor did defendants ever receive permission to use the stored property for their own purposes from any of the persons who stored their property with U.S. Silver. [1/]

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[1] The defendants were also convicted of stealing silver and gold held in storage which was the property of customers who had purchased the material on margin or who had borrowed money against the property. The trial court granted defendants' motion for a new trial as respects these counts and they were subsequently dismissed on motion of the prosecution.

Cont'd

The significant part of defendants' business consisted of arbitrage transactions: The simultaneous buying and selling of a given commodity to capitalize on a price differential. Thus, by selling a given quantity of gold and silver and simultaneously purchasing a contract for the future delivery of the same amount of gold and silver at a lesser price, the profit could be engendered allegedly without the risk of any loss. 2/

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1 Cont'd
Thus, the counts with which this appeal is concerned involve gold and silver which was wholly owned by the customer and placed with U.S. Silver for storage.

2 Defense counsel in his opening statement equated these complex business arrangements to a bookmaking operation. The bookmaker, he explained, does not take a position on the outcome of the game. He keeps his books balanced (referred to as a "zero position") by taking in the same amount in bets on each team. He makes his profit by requiring the bettor to give odds with the result that he will pay out to the winners less money than he takes in from all of the persons who bet.

Defendants envisioned that they could sell the gold and silver belonging to their customers, which was stored in their vault, and simultaneously purchase futures contracts for a lesser amount, thereby making a profit without risking a loss of their customers' property. Defendants testified that they asked their attorney for an opinion as to whether their liability to storage customers could be covered by the purchase of futures contracts so that the physical inventory belonging to the customers could be arbitraged to increase U.S. Silver's profits. Defendants further testified that, in response to their request, their attorney advised them that he had written a letter to the Department of Corporations seeking permission to cover storage liabilities by the purchase of futures contracts, and that he had received a

letter granting U.S. Silver permission to sell the storage inventory and cover the storage liabilities with futures contracts and working capital. [3/]

After receiving and reviewing of the letter from the Department of Corporations, defendants began to sell the stored inventory as part of its arbitrage operation.

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[3] The attorney died prior to the commencement of the trial and did not testify. The letter which the attorney purportedly wrote to the Department of Corporations could not be found in either the files of the deceased attorney or Department of Corporations. The defendants did not see the letter which was written by their attorney. A letter was written by the Department of Corporations addressed to defendants' attorney, dated April 8, 1975, which makes reference to the receipt by the Department of Corporations of a letter of March 27, 1975, requesting approval of the department to use certain price-related commodities as cover for customer commodity transactions. The copy of this letter is attached to this opinion as an exhibit.

Defendants' alleged riskless use of their customers' property became extremely risky because defendants did not utilize all of the proceeds from the sale of the stored material for the purchase of futures contracts. The futures contracts were purchased on margin, requiring that only a portion of the purchase price be paid immediately in cash. A substantial portion of the proceeds from the sale of the stored property was utilized by the defendants for the payment of items such as salaries, bonuses, attorney's fees, advertising expenses, and other items of overhead. In this regard, an amount in excess of $100,000 was paid into a pension and profit sharing plan for employees. Defendants each received substantial salaries ranging from $1,000 per week in October of 1974 to $2,000 per week commencing in

October of 1975, and each received bonuses from time to time in 1975.

Defendants testified that they conducted their business in this manner because they believed that their arbitrage operation was extremely profitable, and that they always had enough liquid assets and futures contracts to fully cover their liability to storage customers. This belief, they testified, was based upon financial information given to them by their controller indicating that U.S. Silver made a substantial profit for the year ending October 1975. This, however, was not the case. A number of accounting errors had been made by the controller which involved more than $1,000,000 in unrecorded liabilities and duplicate sales. A year-end audit disclosed that the business had, in reality, incurred a substantial deficit.

Defendants became aware of these accounting errors in February 1976, attempted to reduce their overhead expenses, and notified the Department of Corporations that, as a result of these errors, U.S. Silver had fallen below the liquidity requirements of the department. After a series of meetings, a receiver was appointed to take over the operations of U.S. Silver. A subsequent audit revealed that as of the date the receiver took possession of the business, the liability to customers for stored inventory was approximately $1,400,000 greater than the total inventory that was in the vault.

The seven persons named as victims in those counts, involved in this appeal, have not received any part of their stored property back from the defendants.

Defendants do not deny that they sold

the stored property without permission, nor do they now make the claim that they had the legal right to do so. [4/] The essence of their defense is at the time of the sale of the stored material, they had the mistaken belief, based upon what had been told to them by their accountant, that they were solvent and had enough assets to cover their liability to the customers, and that they had the further mistaken belief, based upon what was told to them by their attorney, that they had the legal right to sell their customers' stored bullion as part of their business operations.

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[4] Defendants' position in their pretrial motions and at the time of trial was that it would have been lawful for the defendants to have sold the stored material if the customers' position had been adequately covered by liquid assets and futures contracts. This theory was based upon an interpretation of section 350.537.6 of title 10 of the California Administrative Code (these regulations were subsequently Cont'd

THE DEFENSE OF MISTAKE OF FACT

Defendants requested that the following jury instruction be given: "An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.

"Thus a person is not guilty of a crime if he commits an act or omits to act under an honest belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful."

The trial court refused to give the requested instruction and instead read the

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4 Cont'd
repealed in 1980), which permitted a margin coin dealer to provide cover with commodities deliverable under futures contracts. Defendants urged that rules pertaining to the margin coin dealer were equally applicable to the storage of customer bullion. Defendants have apparently recognized the total lack of merit in this position and make no such contention on appeal.

jury the instruction contained in CALJIC 4.35. [5]

The only alleged mistake of fact purportedly made by defendants (as opposed to mistake of law which will hereinafter be discussed) was the mistake relating to the financial condition of U.S. Silver. This mistake, however, would serve to justify defendants' conduct only if defendants would have had the right to sell the stored commodities had the accountant's financial data been accurate.

They would have had no such right.

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[5] CALJIC 4.35 states: "An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.

"Thus, a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful."

The storage customers deposited their personal property with defendants for safekeeping and defendants agreed to return the property to the customers on demand. Thus, a bailment was created. In the absence of a contractual authority to do so, any use of the bailed property by the bailee is improper. (Civ.Code, §1835.) There was no provision in the California Administrative Code, or in any other statute to which defendants have alluded, which permits a person to whom property has been entrusted for storage and safekeeping to utilize such property as part of his business operations without the specific authorization of the owner.

Therefore, defendants' alleged mistaken belief in the accuracy of the financial data given to them would not have formulated a defense to the charge of theft and the jury

need not have been so instructed. [6]

Defendants rely upon People v. Navarro (1979) 99 Cal.App.3d Supp. 1, in support of their position that they were entitled to an instruction to the effect that an honest mistake of fact, even if not based upon reasonable grounds, is a defense to a crime of theft. Defendants' reliance on Navarro is misplaced.

The mistake of fact involved in the Navarro case concerned whether the lumber which was left on the construction site had been abandoned by the owner. The defendant

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[6] The mistaken belief as to financial data might have some bearing upon whether defendants had the requisite specific intent to permanently deprive the owners of the stored commodities of their property at the time the property was sold. The jury was adequately instructed that such specific intent was necessary for the conviction. The jury by its finding of guilt impliedly found the existence of such specific intent notwithstanding the evidence adduced by defendants which purported to show their mistaken belief in their company's financial position.

claimed that he so believed, and, if his belief had been accurate, he would have had the right to have taken the lumber.

In the instant case defendants at no time made the claim that they believed they had permission of their storage customers to sell the stored commodities. To the contrary, the evidence established that defendants never asked permission of the storage customers to sell their property, and defendants made it a matter of their business tactics not to tell the customers of their use or intended use of the storage property.

The trial court did not err in failing to give the requested instruction on mistake of fact.

MISTAKE OF LAW

The People assert that a mistake of law based upon the advice of counsel is not a defense to a criminal charge. This prosecution is valid as respects general intent crimes. Thus, in People v. McCalla (1923) 63 Cal.App. 783, 793, and People v. Aresen (1949) 91 Cal.App.2d 26, 35, it was held that it is not a defense to an alleged violation of the Corporate Securities Act, a crime which does not require a specific intent, that the defendant believed his conduct was lawful based upon the advice of his counsel. Similarly, in the recent case of People v. Snyder (1981) 121 Cal.App.3d 73, 75, defendant's mistaken belief that she was convicted of a misdemeanor and not a felony was not a defense to the crime of possession of a concealed firearm by a convicted felon (Pen. Code, §12021), and she was not entitled

to have the jury instructed that her mistaken belief constituted a defense.

This principle, however has no application with respect to crimes requiring a specific intent. It has been recognized in California since the turn of the century that ignorance or mistake of law can negate the existence of a specific intent, and that it is a valid defense to a charge of theft that the accused honestly believed that he had the right to take the subject property even if such belief was based on a misconception of the law. (People v. Goodin (1902) 136 Cal. 455, 458-459.) It has also been recognized, however, for approximately the same length of time, that an accused is only entitled to such an instruction if the evidence supports a reasonable inference that any such claimed belief was held in good faith. (People v. Holmes (1910) 13 Cal.App.

212, 217.) The assertion by an accused that he believed that he had the right to appropriate the property of another does not compel the giving of the instruction if the circumstances do not indicate that such belief was held in good faith. In this regard the Supreme Court in People v. Stewart (1976) 16 Cal.3d 133, 140, stated as follows: "Subsequent cases have explained that, 'Whether a claim is advanced in good faith does not depend solely upon whether the claimant believes he was acting lawfully; the circumstances must be indicative of good faith.' (People v. Martin (1957) 153 Cal.App.2d 275, 283; accord, People v. Scholder (1956) 143 Cal. App.2d Supp. 836, 839.) For example, the circumstances in a particular case might indicate that although defendant may have 'believed' he acted lawfully, he was aware of

contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith . . . ." 7/

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7 The Stewart court upheld the trial court's refusal to instruct the jury in an embezzlement case that a belief by the defendant that he was acting within the scope of his authority was a defense to the charge because the instruction did not specify that the belief had to be held in good faith. A number of instructions of similar import were requested by defendants in the instant case, which instructions were properly refused by the trial court. These instructions included the following: "A defendant has a right to rely on the advice of an attorney with respect to his legal rights and obligations.

"If you find that an attorney told a defendant that he had the right to sell storage coins or bullion and cover for such storage with quick assets and futures contracts, and that a defendant did so do based on such advice, you must acquit each defendant on each count where such conduct is the theory upon which the prosecution bases its case.

"If you find that a defendant undertook any activity in this case with the belief that such activity was approved by the State of California, you must acquit a defendant for any count predicated on such activity."

There is no evidence in the instant case from which it can be reasonably inferred that defendants' alleged belief that they had the right to sell the property which had been entrusted to them for storage purposes was a good faith belief. To the contrary, from the facts known to defendants, any such belief would have been unwarranted and in bad faith. Defendants knew that the property entrusted to them for storage purposes was given to them for the purpose of safekeeping, and that they had no authorization from the owners of the property to use the property in their business; that the warehouse receipts which they issued to their customers identified the storage property by lot numbers and indicated that the customers could reclaim storage property at any time; that it was their business

practice not to notify the customers of their use of the stored property; that any profits derived from the use of the stored property would enure solely to the benefit of defendants, and the customers would not participate in any profits engendered by the sale of their property; that there was no law, rule or regulation which permitted defendants to sell storage property without customer authorizations.

Further, the letter from the Department of Corporations of April 8, 1975, could not serve as a basis for the formulation of such a good faith belief. It is totally unsusceptible of an interpretation which would permit defendants to take possession of property which had been entrusted to them for storage purposes, and to use such property in their business without the consent of the owners. Defendants' assertion that they

believed their attorney when he told them that this letter authorized such activities is also wholly unreasonable.

In the absence of some evidence from which it can be inferred that defendants' alleged belief in the lawfulness of their conduct was in good faith, the court was under no duty to instruct the jury that a good faith mistake of law constituted a defense to the action. [8]

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[8] The conviction in People v. Stewart, supra, 16 Cal.3d 133, 140, 142, was reversed because the trial court failed, sua sponte, to instruct the jury that a good faith belief in the right to use the property in question constituted a defense. The facts of the Stewart case, however, unlike the facts of the instant case, indicated that the claimed belief in the lawfulness of defendant's conduct was in good faith. The defendant in Stewart testified that he had received permission from the person he believed was a sole owner of the company to write checks and use money for his own investments, and he did so openly without any attempt to conceal the taking of the funds. (Id., at p. 138.)

THE FORM OF THEFT COMMITTED

Defendants contend that it was error for the trial court to instruct the jury that they need not agree on the form of theft committed by defendants. (CALJIC 14.47.) [9]

The People's position at the trial was that defendants committed grand theft by either committing larceny by trick at the time defendants took possession of storage property because they then entertained the intention to convert it to their own use, or by embezzling the property after it had been entrusted to their safekeeping. Defendants assert that since the receiving of the property and the selling thereof came

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[9] The instruction given was as follows: "If you agree unanimously that defendant committed the crime of theft, you should find the defendant guilty, and you are not required to agree as to which particular form of theft the defendant committed."

at different times and consisted of two different acts, it was conceivable that, under the court's instruction, some of the jurors may have found that there was larceny by trick, while others might have found that there was an embezzlement, with the result that the jury may not have unanimously agreed as to the act upon which the finding of guilt was based. This contention is imaginative but not based in reality. Any juror who found that defendants took possession of the property with the intent to convert it to their own use at some later time (theft by trick) must certainly have also found that defendants committed an embezzlement when the property was in fact sold. Thus, the jurors unquestionably agreed unanimously that a theft was committed when the stored property was sold, irrespective of when they believed

that the intent to steal was first formulated.

It is unnecessary for a jury to agree upon the method by which a theft is committed. (People v. Nor Woods (1951) 37 Cal.2d 584, 586.) The trial court's instruction to the jury is a correct statement of the law and was properly given. 10/

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10 Although defense counsel objected to the trial court giving CALJIC 14.47, he did not request that the court give CALJIC 17.01, which states: "The defendant is charged with the offense of ____. He may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of such acts, but in order to find the defendant guilty, all the jurors must agree that he committed the same act or acts. It is not a necessary [sic] that the particular act or acts committed so agreed upon be stated in the verdict."

CALJIC 17.01 would have nailed down the problem which defendants appeared to find so troublesome. We do not concur with defendants' contention that defendants may have been deprived of a decision by unanimous jury under the instructions given and, accordingly, we find that the trial court had no sua sponte duty to give CALJIC 17.01 to the jury.

SUFFICIENCY OF THE EVIDENCE

Defendants contend that the evidence was insufficient to support a finding that defendants took any of the property belonging to the seven persons named as victims in those counts involved in this appeal. This contention proceeds upon the theory that it was not enough for the prosecution to prove that a shortage existed among all of the storage customers, but the prosecution was required to prove that the particular property stored by the seven victims was property which defendants assert, prosecution failed to do because the evidence established that when the receiver took possession of the defendants' business there was sufficient amount of inventory on hand to cover the amount deposited by each of the seven named victims.

There is no merit to this contention.

The evidence established that defendants comingled property of the numerous storage customers into a common pool, removed property from this pool, and sold it in the course of defendants' business operations. By the time the receiver took over the operation of the business, approximately $1,400,000 in stored property was missing from the vault. The pool of property was depleted by defendants to a point where none of the property which they had placed in storage by the seven named victims was ever returned to them. This evidence amply supports the jury's implied finding that their property was taken from them.

EVIDENCE OF DEFENDANTS' COURSE OF CONDUCT

Defendants contend that the court erred in admitting evidence that defendants failed to segregate the stored bullion and failed to comply with certain other regulations of

the Department of Corporations in the conduct of their business. They further contend that this error was compounded by the trial court's instruction to the jury regarding the legal nature of the warehouse receipt [11] because it invited the jury to consider comingling as evidence of theft.

The concept of comingling, however, was not introduced into the case by the prosecution but was mentioned for the first time by the defense counsel in his opening statement. The jury was then told that the evidence would establish that the property stored by defendants was fungible in nature

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[11] The trial court instructed the jury as follows: "Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be comingled."

and that it was unnecessary for defendants to keep the stored property in separate lots. Thereafter, throughout the trial, defendants attempted to elicit evidence from a number of witnesses in an effort to prove that the stored property could lawfully be comingled and, for the most part, did not object to questions asked by the prosecutor in this area. Moreover, not only did the defense counsel not object to the giving of the instruction now challenged on appeal, which defines when stored property need be and need not be segregated, but himself requested that instruction of a similar import be given.

Thus, defendants during the trial regarded evidence as to the manner in which defendants conducted their business as relevant to the issues involved in the proceedings and may not now validly claim such

evidence should not have been admitted. The instruction given by the trial court was an accurate statement of the law on a subject which defendants wanted covered by the instruction. The instruction did not, as defendants contend, suggest to the jury that the comingling of the stored property was evidence tending to show that the property was stolen. Defendants suffered no prejudice by the giving of the instruction.

We find defendants' remaining contentions that the district attorney was guilty of misconduct in connection with his cross-examination of defendant Vineberg, and that defendants were unduly restricted in their cross-examination of certain prosecution witnesses, to be unpersuasive. Defendants received a fair trial. The evidence of their guilt was substantial.

The judgments of conviction are affirmed.

CERTIFIED FOR PUBLICATION.

WOLF, J. *

We concur:

ASHBY, Acting P.J.

HASTINGS, J.

*Assigned by the Chief Justice of California.

Superior Court of Los Angeles County

Sara K. Radin, Judge

Richard H. Kirschner for Defendants and Appellants.

George Deukmejian, Attorney General, Robert W. Philibosian, Chief Assistant Attorney General, S.Clark Moore, Assistant Attorney General, Norman H. Sokolow and William V. Ballough, Deputy Attorneys General, for Plaintiff and Respondent.

State of California — Edmund G. Brown Jr., Governor

DEPARTMENT OF CORPORATIONS

Los Angeles, California
April 8, 1975

In Reply Refer to:
File No. 923 9105

Rubin & Mayorga
Attorneys at Law
8383 Wilshire Boulevard, Suite 1026
Beverly Hills, California 90211

Attention: Henry H. Rubin, Esq.

Reference: UNITED STATES SILVER CORPORATION

Gentlemen:

We have received your March 27, 1975 letter requesting our approval to use certain price related commodities as cover for your customer commodity liabilities.

United States Silver Corporation is hereby granted permission to (1) use the following price related gold commodities as cover for each other, and (2) use the following price related silver commodities as cover for each other, provided that coverage will be computed by using the market value (unaffiliated supplier ask) of these commodities, and "unit" coverage will have no relevance for computations made pursuant to Section 350.537.6(c)(1):

PRICE RELATED GOLD COMMODITIES

1. Austrian Coronas (10 and 100)
2. Hungarian Coronas (10 and 100)
3. Mexican Pesos
4. British Soveriegns
5. Ducats
6. Gold Bullion
7. Kruger-Rands

PRICE RELATED SILVER COMMODITIES

1. Silver Bullion
2. Pre-1965 Silver Coin Bags
3. 1965-1969 Silver Coin Bags (subject to the following restrictions)

We will not permit 1965-1969 silver coin bags (clads) to be used as a price related commodity whenever the New York silver spot price is less than $3.50 an ounce.

Sincerely,

s/ W H Sharpe

W. H. SHARPE
Specialist
Commodity Law

WHS:fn

CERTIFIED FOR PUBLICATION

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, vs. NORMAN VINEBERG and DOUGLAS TODD PARKER, Defendant and Appellants.	2d Crim.No.36674 LASC No.A-340755 MODIFICATION and ORDER DENYING REHEARING Court of Appeal - Second Dist. FILED Nov.25, 1981 Clay Robbins, Jr., Clerk.

THE COURT:

It is ordered that the opinion filed herein on October 30, 1981, be modified in the following particulars:

On page 3, line 1 of footnote 2, the word "Defense" is changed to "Trial" so that the sentence reads:

Trial counsel in his opening statement equated these complex business arrangements to a bookmaking operation.

The Petition for Rehearing is denied.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JAN 20 1982

I have this day filed Order

In re: 2 Crim. *No.* 36674

People

vs.

Norman Vineberg & Douglas Todd Parker

Respectfully,

Clerk

cer

Los Angeles, Cal. JAN 29 1982, 19

TITLE { PEO. VINEBERG & PARKER } No. 366774

REMITTITUR ISSUED

CLAY ROBBINS, *Clerk*

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